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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1046

F. DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

SANTIAGO DIAZ, *et al.*,

Appellees.

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEES

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I.

JURISDICTION

As a result of the Court's decision in *Weinberger v. Salfi*, ____ U.S. ____, 95 S.Ct. 2457 (1975), the Secretary has raised the question of the district court's jurisdiction to have heard the claims of appellee Espinosa and the members of his class.

Salfi holds that 42 U.S.C. § 405(g) provides the exclusive method of obtaining federal court jurisdiction over suits challenging the denial of Social Security Act benefits. In order to assert that jurisdiction, a person must have exhausted available administrative remedies. Because the class members in *Salfi* were not alleged to "have even filed an application with the Secretary", nor did the Secretary make any decision "final or otherwise", the Court held that the class could not satisfy the requirements of 42 U.S.C. § 405(g). *Salfi*, 95 S.Ct. at 2466. However the named plaintiffs were found to have met the jurisdictional requirements by virtue of the fact that prior to suing, they had been denied benefits at a regional level and the Secretary did not challenge the "finality" of that decision. Similarly, in *Weinberger v. Weisenfeld*, 420 U.S. ____, 95 S.Ct. 1225 (1975), the Court concluded that jurisdiction was present where the "Secretary stipulated that exhaustion would have been futile and he did not make any contentions that Weisenfeld had not complied with the requirements of § 405(g)." *Salfi*, 95 S.Ct. at 2468 n.10.

In his Supplemental Brief the Secretary concedes that the district court had jurisdiction over Diaz and Clara because they applied for benefits, were initially denied (at a level lower than the regional level in *Salfi*) and then brought suit. The Brief states:

> The Secretary has determined that since Diaz and Clara's applications do not raise any disputed issues of fact, further administrative review of those applications would be futile and therefore that the initial determinations are 'final' for the purposes of this litigation.
> See *Salfi* slip op., at p. 15
>
> Supplemental Brief for the Appellant p. 5 (footnote omitted)

Thus, while finality is the touchstone of 405(g) jurisdiction, the Court recognized in *Salfi* that the Secretary can agree to accept as final something less than a hearing before an administrative law judge and consideration by the Appeals Council. In this case the Secretary has accepted an initial rejection of Diaz and Clara as "final". Since, as we show below, he has also accepted the "finality" of the determination of Espinosa's claim, *Salfi* poses no procedural barrier.

A. Jurisdiction as to Espinosa

The Secretary's original Brief, filed pre-*Salfi*, states "It was stipulated (cf. A 50) that his [Espinosa's] application would be deemed denied for failure to meet the five year residency requirement of 42 U.S.C. (Supp II) 1395o(2)(B)." Appellant's Brief, p.5, n.5. The Jurisdictional Statement noted:

> Following the filing of the suit, Espinosa applied for enrollment in the Part B Medicare program. It was stipulated that his application would be administratively denied for failure to meet the durational residency requirement of 42 U.S.C. 1395o(2)(B)
>
> Jurisdictional Statement, p. 3 n. 3.

The record reflects that at the time of the filing of the amended complaint which included Espinosa as a plaintiff (September 20, 1972, App. 17), he had not yet applied for benefits. But on October 26, 1972 he did file a claim and his counsel filed an affidavit with the court reflecting that fact. While the complaint was not formally amended or supplemented to reflect

Espinosa's application, its existence was conceded by counsel for the Secretary (Record on Appeal pp. 224-226, Transcript of November 22, 1972 hearing). Thereafter counsel for both the Secretary and Espinosa agreed that the case was ripe for summary judgment (Record on Appeal p. 227). Thus the issue of 405(g) jurisdiction, which had been alluded to earlier in the hearing (Record on Appeal 195), was removed from the case when the Secretary's counsel stipulated that Espinosa had applied for benefits and, by agreeing that the case was ready for summary judgment, acknowledged that further administrative review would be futile and that Espinosa's rejection was final.

The Secretary's commitment to the "finality" of Espinosa's rejection is reflected by his Brief and Jurisdictional Statement reaffirmations that administrative denial was assured. Although the Secretary cannot stipulate to the jurisdiction of a court, he can decide when his determinations are "final", *Salfi*, 95 S.Ct. at 2467. He concluded that Espinosa met the "finality" requirement and now, post *Salfi*, he cannot recede from that position and contend that Espinosa's claim should be dismissed for want of jurisdiction.[1]

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[1] Apparently the Secretary is contemplating regulations which will specify when a denial of benefits decision will be final in order to furnish a basis for consistent treatment of similar cases presenting the jurisdictional question involved here. Supplemental Brief for Appellant, p.5 n.2. Until that time, the Secretary cannot be permitted to merely claim finality or non-finality at his pleasure. In this case he has committed himself to finality and must be bound by it.

The Secretary's assertion, made in footnote 1 of his Supplemental Brief, that a question of fact was presented by Espinosa's application is superfluous in light of his earlier stipulation. Moreover, counsel for the Secretary has informed undersigned counsel that no factual question about Espinosa's application now exists and the residence requirement is the only issue presented by his application.

B. Jurisdiction as to the Class Represented by Espinosa

The Secretary is correct is saying that the complaint contained no allegations stating that the members of Espinosa's class had applied for Part B Medicare benefits. But once it became established that Espinosa had applied for those benefits and had been denied, he became the representative of similarly situated persons. The portion of the district court decision certifying Espinosa's sub-class as those who "have been" denied enrollment because of the durational residency requirement can be viewed as creating a limited class over which 405(g) jurisdiction existed.

Even if *Salfi* prompted a contrary conclusion, Espinosa's claims survive and present an issue which must be decided. Since Espinosa will not meet the five year residency requirement until June 20, 1976 (he became a permanent resident alien on June 20, 1971, App. 18) he still has the requisite standing to present a case or controversy under Article III of the Constitution. Moreover, the district court decision granted enrollment benefits to Espinosa from "this day [June 11, 1973] forward" (App. 66-68). Since he applied on October 26, 1972, he would be entitled to benefits from the date of his initial eligibility if the statute is unconstitutional. See 42 U.S.C. § 1395q.

Therefore, to the extent that review of the decision below may decide Espinosa's entitlement to certain economic benefits prior to June 11, 1973, the case cannot become moot because a continuing controversy will exist as to his eligibility during that period, even after he fulfills the five year residency requirement.

II.

THE MERITS

In its supplemental argument on the merits, the Secretary's Brief speculated on the current status of Diaz and Clara and wondered about the effect that a change in their status might have on the issues in this case. Supplemental Brief for Appellant, p. 4 n.4.

Diaz and Clara are still unable to meet the lawfully admitted for permanent residence status or the continuous five year residence requirement. Diaz entered the United States in February, 1971 and Clara in July, 1971 as lawfully admitted Cuban parolees (App. 33-36). They have applied for a retroactive adjustment of their status to permanent residence, but because of the delays which exist in processing such applications, they cannot expect to receive such adjustments until late 1976 or early 1977. Therefore Diaz and Clara still present the severability issue and the issue of the validity of the permanent residence requirement.

Since Espinosa's claim is not jurisdictionally barred, the five year residence requirement is still an issue in this case. Thus, all of the questions originally presented are still before the Court.

A. The Impact of Salfi on the Merits of this Case

The Secretary states that the permanent residence and durational residency requirement "are rationally related to the legitimate legislative objective of limiting the availability of subsidized health care to those with a

substantial relationship to this country." Supplemental Brief for Appellant p. 8. Relying upon *Salfi*, he argues that while those tests do not perfectly accomplish the legislative objective, they are reasonable and therefore constitutional.

In *Salfi* the court found that a duration-of-relationship requirement imposed upon wives seeking certain Social Security benefits met the rational basis test which was appropriate for measuring the legislative classifications at issue. While we have argued, and still maintain, that distinctions based on alienage and governmental classifications affecting basic necessities of life like health care, require scrutiny under the "compelling governmental interest test", we take this opportunity to show that even under the lesser test of *Salfi*, the complained of statutory provisions are deficient.

The Court stated the issue in *Salfi* this way:

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation on qualification would protect against its occurrence and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.
> *Weinberger v. Salfi*, ____ U.S. ____, 95 S.Ct. at 2472-2473.

Then the Court set forth the extensive legislative history of the *Salfi* duration-of-relationship requirements, and of analogous requirements. That history reflected longstanding congressional concerns over sham marriages being entered into solely for the purpose of

securing benefits and the expense of making individual determinations on those claims. The Court took pains to point out that the relevant statute included a host of exceptions which would permit a person who did not meet the durational test to qualify for benefits when "other objective evidences of marital responsibilities are present." *Id.* 95 S.Ct. at 2474.

By comparison, the dual residence requirements imposed upon Diaz, Clara and Espinosa, are not the products of longstanding congressional concerns and articulated legislative objectives. While the Secretary now maintains unequivocally that the provisions reflect "the desire of Congress to limit the social insurance program contained in the Social Security Act to those with a demonstrable tie to the nation" (Supplemental Brief of Appellant p. 12) his position was not always so certain.

> The limitation on the eligibility of aliens for Part B imposed by Congres *may be seen* as reflecting a policy judgment concerning the desirable degree of attachment to this country requisite for a non-citizen to enjoy one of the varied statutory privileges of a citizen in the field of social welfare.
>
> Brief for the Appellant, p. 27 (emphasis supplied).

Certainly no extensive legislative history has been shown which supports the conclusion that the provisions implement the legislative objective enunciated by the Secretary.

On the contrary, more recent congressional enactments in the social welfare field providing benefits to aliens evince an abandonment of both the durational residence test and the permanent residence test. See 42 U.S.C. § 1382c(a)(1)(B) which makes substantial aid available to otherwise qualified aged, blind and disabled persons who are:

> either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of § 1153(a)(7) [conditional entry] or section 1182 (d) (5) [parole] of Title 8).[2]

In addition to a lack of clear legislative history to support his legislative objective argument, the Secretary's reliance upon *Salfi* overlooks the Court's initial recognition there that the duration-of-relationship requirement was "effective only within a narrow range of situations" and that other methods of showing "marital responsibilities" were available to overcome the presumption it generated. *Weinberger v. Salfi*, ____ U.S. ____, 95 S.Ct. at 2474.

[2] This recent enactment is also helpful in dispelling the notion that the alien residence requirements contained in 42 U.S.C. (Supp II) § 1395o (2)(B) in some way supplement immigration law standards requiring self support. Implementation of those standards is a matter for the Immigration and Naturalization Service of the Department of Justice (cf. App. 67 n.24). But the Congress obviously has not attempted to integrate the policies of those standards into its social welfare legislation. Certainly providing assistance to aged, blind and disabled aliens evinces the intent to treat the need for aid and the self support requirements separately. Consequently, the contention that Congress could have constitutionally created a Part B residence requirement by placing it in the immigration laws governing admission to the United States (over which it has plenary power), is inappropriate in this case because Congress did not do so and there is no reason to view its enactments regarding the social welfare of aliens as complementary to its immigration laws.

The dual residency requirements in this case are flat prohibitions which offer no escape clauses. Instead of attempting to accomplish a legislative purpose in a narrow rational way, they accomplish nothing more than precluding immigrant aliens, for no clearly apparent legislative reason, from receiving basic health care benefits.[3] Benefits which would be financed in part by their own premium payments. 42 U.S.C. § 1395r(b)

Salfi does not compel the conclusion that the dual residency requirements here are constitutional. On the contrary, the analysis used by the Court in *Salfi* leads to the conclusion that these provisions are not rationally related to a legitimate legislative objective. The ultimate purpose of the benefits extended by Congress in Part B is to provide elderly persons with protections against costs of medical services. See 1965 U.S. Code Cong. and Admin. News p. 1943, 1945. That legislative objective is not accomplished by the imposition of the durational residence requirement and the permanent residence test.

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[3]It is interesting that in 1967 the duration-of-relationship requirement in *Salfi* was reduced from one year to nine months in an effort to ameliorate some harsh results which had occurred under the longer test. *Salfi*, 95 S.Ct. at 2473-2474. This underscores the precision with which Congress legislated in that area, and the bluntness of its legislation in this case.

CONCLUSION

For the reasons advanced in our original Brief, and those advanced here, the judgment of the district court should be affirmed.

Respectfully submitted,

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